

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANNY L. OMO

Claimant

VS.

MCDS FEDERAL CONTRACTING, INC.

Respondent

AND

CONTINENTAL WESTERN INS. CO.

Insurance Carrier

Docket No. 1,024,482

ORDER

Respondent and its insurance carrier (respondent) request review of the January 10, 2006 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found that claimant's injury arose out of and in the course of his employment with respondent on July 22, 2005, and authorized Dr. Ronald Davis as claimant's treating physician.

Respondent argues that claimant failed to prove by a preponderance of the credible evidence that he suffered any injury which arose out of and in the course of his employment with respondent.

Claimant requests that the ALJ's Order be affirmed in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent, a private recycling company contracted by the United States Air Force, in 2004. On July 22, 2005, he and a coworker, David

Townsend, were working at McConnell Air Force Base going from building to building collecting recycling. While they were in the Engineering building, claimant went to collect a recycling bag in a corner when the building wall collapsed and allegedly hit him on the head, shoulders and upper back. The wall did not fall to the ground but hit a door hinge and stopped. Claimant stated he was trapped between the fallen wall and the recycling bag and had to bend down and back out. After the wall fell, claimant and Mr. Townsend called for help, and Donald Campbell helped move the wall so that claimant and Mr. Townsend could leave the building.

Claimant and Mr. Townsend went to the offices of respondent and told Todd Howard, their supervisor, what had occurred. Claimant testified that he told Mr. Howard that the wall landed on top of him but did not knock him to the ground. He continued to work the rest of the day. He did not receive any marks or bruises from the falling wall.

Four days after the incident, claimant began complaining of pain. On July 28, claimant went to the VA Hospital, where he was diagnosed with low back strain. The VA records from that date indicate the doctor found no obvious trauma or defects. Claimant went to Dr. Ronald Davis on August 4, 2005, at the request of respondent. Dr. Davis indicated that claimant's lumbar back was normal with no swelling, deformity or discoloration. Dr. Davis gave claimant restrictions of no lifting more than ten pounds and told him to change positions periodically. Claimant continues to work for respondent doing light duty work. He last saw Dr. Davis on August 31, 2005, at which time Dr. Davis told him that his treatment was no longer authorized.

Claimant testified at his October 18, 2005 deposition that he had previously filed a workers compensation claim only once, sometime between 2002 and 2004, while he was employed with the City of Wichita. At that time, he was complaining of a sprained back. He was off work for two or three days, and the claim was settled. He did not think he had any permanent restrictions after that injury. After further questioning, claimant recalled that he had also filed a workers compensation claim while working for a placement service when he injured a muscle in his thumb. He was asked whether he claimed a low back injury while working for Safelite Auto Glass in 1995, but he had no recollection of being injured then. He also admitted a workers compensation claim in 2000 when he was working for Sherwin-Williams Company and had a left arm strain. He could not remember whether that claim ended in an award or settlement but stated he was represented by an attorney. Also, in February 2005, claimant was rear-ended in an automobile accident, after which he had complaints of pain in his left lumbar area and was treated by a doctor at the VA Hospital. A lawsuit was filed in relation to that accident, and at the time of claimant's deposition in October 2005, that case was still ongoing. Claimant indicated that he was prescribed medication for that injury and that his medical treatment was continuing on an as-needed basis. At the October 18, 2005 deposition, claimant said he had seen the

physician who was treating him for the back injury from the automobile accident as recently as “last month.”¹

Mr. Townsend testified that on the morning of July 22, 2005, he was working with claimant picking up recycling bags. He was with claimant at the time the wall fell in the Engineering building. He said that both the claimant and he were about two feet away from the falling wall and that neither of them were actually hit by the wall. When he and the claimant reported the incident to their supervisor, Mr. Howard, Mr. Howard asked if any paperwork needed to be filled out over the incident, and both he and claimant said no. Mr. Townsend testified that a day or two later, claimant told him that if they had been hurt by the falling wall, they could have sued and gotten money out of the incident. Mr. Townsend reported this conversation to Mr. Howard. Mr. Townsend also testified that at one point, claimant and he were talking about claimant’s workers compensation claim and claimant said, “Well, if the attorneys contact you, maybe I should pay you off.”²

Mr. Howard corroborated Mr. Townsend’s testimony that when he was told about the falling wall, he asked if he needed to fill out any paperwork and was told no. Mr. Howard said claimant did not tell him he had been hit by the wall. Both claimant and Mr. Townsend said they were “nearly” hit by the wall.³ Four days later, however, on July 26, 2005, claimant came to him and said that the wall had actually hit him and that his back was burning because of it.

Mr. Campbell also testified. He is employed by the United States Air Force in the Civil Engineering Squadron and does not work for respondent. On the date of the accident he was working in his office, which was near the area where the recycling bags are kept. He heard a commotion and saw that a partition in the area had leaned over. When he went to investigate, he saw the partition was leaning up against the door closer. He opened the door and helped claimant and Mr. Townsend push the partition back in place. He did not see the partition fall and could not remember anyone saying they had been hit or hurt by the falling partition. He testified that the partition was not a solid wall but an L-shaped partition constructed of two-by-four’s and sheetrock.

It is the claimant that bears the burden of proof in these matters.⁴ Respondent argues there is no credible evidence that claimant was hit by the wall or that he was hurt in any way in this incident. The Board finds that claimant has failed to meet his burden of proving he sustained personal injury by accident arising out of and in the course of his

¹Omo Depo. at 20.

²P.H. Trans. at 18.

³*Id.* at 23.

⁴K.S.A. 2005 Supp. 44-501(a) and K.S.A. 2005 Supp. 44-508(g).

employment with respondent. The greater weight of the credible evidence is that claimant was neither struck nor injured by the partition that fell on July 22, 2005. The delay in the onset of symptoms, the absence of bruises or abrasions, claimant's early denials both of being struck by the partition and of being injured, claimant's preexisting injuries, and claimant's statements that call into question his veracity all support a denial of this claim.

As provided by the Act, preliminary hearing findings are not final but are subject to modification upon a full hearing on the claim.⁵

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated January 10, 2006, is reversed.

IT IS SO ORDERED.

Dated this _____ day of March, 2006.

BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁵K.S.A. 44-534a(a)(2).